Supreme Court, U.S.
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No. 99-309

In The

Supreme Court of the United States

JACK M. WEBB, Special Deputy Receiver for Employers National Insurance Company in Receivership,

Petitioner,

v.

B.C. ROGERS POULTRY, INC. and B.C. ROGERS PROCESSORS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties.

CORPORATE DISCLOSURE STATEMENT

No parent or publicly held company owns 10% or more of the stock in B.C. Rogers Poultry, Inc. or B.C. Rogers Processors, Inc.

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BRIEF IN OPPOSITION

I. Preliminary Statement

In *Webb v. B.C. Rogers Poultry, Inc.*, 174 F.3d 697 (5th Cir. 1999), the Fifth Circuit Court of Appeals held that *Burford* abstention could not be used to remand a damages only action. *Webb* is consistent with this Court's holding in *Quackenbush v. Allstate Insurance Company*, 517 U.S. 706 (1996). Further, the rationale, reasoning, and legal analysis set out in *Webb* is consistent with Texas law and cases from the other circuits. For these reasons, Webb's Petition for Writ of Certiorari should be denied.

II. *Webb v. B.C. Rogers* stands for the proposition that *Burford* abstention cannot be used to remand a damages only action.

Jack Webb – Special Deputy Receiver from Employer's National Insurance Company ("ENIC") in receivership – sued B.C. Rogers – an ENIC policyholder – in Texas State Court, seeking to recover $674,335.00 in allegedly unpaid workers' compensation insurance premiums. Webb asserted three claims in this suit: (1) breach of contract, (2) *quantum meruit*, and (3) suit on a sworn account.

B.C. Rogers removed the case to federal court. Webb asked the federal court to remand the case based on the *Burford* abstention doctrine. The district court granted Webb's Motion to Remand, finding that *Burford*'s abstention was appropriate:

> Abstention is appropriate in this case, for if this Court were to exercise federal jurisdiction, it

> could well interfere with the State of Texas' efforts to effect a coherent policy on a matter of public concern, that is, the collection of assets of an insolvent insurer through a state district court receivership proceeding wherein the state district court retains continuing jurisdiction over the liquidation proceedings.

Appendix B to Petition.

B.C. Rogers appealed the district court's Remand Order. The Fifth Circuit Court of Appeals reversed, finding that the *Burford* abstention was not available in a damages only action:

> Because the district court lacked discretion to remand these damages actions, we REVERSE and REMAND for further proceedings consistent with this opinion.

Webb, 174 F.3d at 705. The *Webb* decision is on point with this Court's recent decision in *Quackenbush v. Allstate Insurance Company, supra,* and other post-*Quackenbush* decisions.

III. In *Quackenbush*, this Court held that *Burford* abstention could not be used to remand or dismiss a damages only action.

Webb v. B.C. Rogers is on point factually and legally with this Court's opinion in *Quackenbush v. Allstate Insurance Company*, 517 U.S. 706 (1996). As in *Webb*, *Quackenbush* involved the application of the *Burford* abstention doctrine to the remand of a damages only lawsuit brought by the receiver of an insolvent insurance company. Prior to *Quackenbush*, the Court had never addressed "whether principles underlying our abstention

cases would support the remand or dismissal of a common-law action for damages." *Quackenbush*, 517 U.S. at 719. Against this backdrop, the Court framed the issue in *Quackenbush* as follows:

> In this case, we consider whether . . . the abstention doctrine first recognized in *Burford v. Sun Oil Company*, 319 U.S. 315, 63 S.C. 1098, 87 L. Ed. 1424 (1943), can be applied in a common-law suit for damages.

Id. at 709. This Court resolved that issue by clearly stating that *Burford* abstention is not appropriate in a case for money damages:

> Under our precedents, federal courts have the power to dismiss or remand cases based on abstention principles only where the relief sought is equitable or otherwise discretionary. Because this was a damages action, we conclude that the district court's remand order was an unwarranted application of the *Burford* doctrine.

Id. at 731.

Webb refuses to acknowledge and accept the clear and unequivocal *Quackenbush* holding. Instead, Webb clings to a passage from *Quackenbush* dealing with the roots and purposes of the abstention doctrine in an attempt to argue that abstention is avoidable in this damages only action. Petition at p. 12. Webb used this tact in the court below, and Justice Smith correctly rejected Webb's overly simplistic reading of *Quackenbush*. *Webb*, 174 F.3d at 702-703. Instead, Justice Smith noted correctly that when this Court reached its holding in *Quackenbush*:

> it left no exceptions: abstention is appropriate "*only* where the relief being sought is equitable or otherwise discretionary."

Webb, 174 F.3d at 703, citing *Quackenbush*, 517 U.S. at 731 (emphasis added).

The Fifth Circuit's *Webb* opinion is well researched, reasoned and written. The factual background in question presented is on point with what this Court reviewed in *Quackenbush*. Nothing in the *Webb* opinion merits review by this Court. Additionally, nothing in the *Webb* opinion conflicts with the rulings of the other circuits or any Texas court.

IV. *Webb* is consistent and in line with decisions from other circuits regarding the application of *Burford* abstention after *Quackenbush*.

There is no dispute that prior to *Quackenbush* the Fifth Circuit and other federal courts had consistently used *Burford* abstention to remand actions against involving insurance companies in ongoing state delinquency proceedings. *See, e.g., Barnhardt Marine Ins., Inc. v. New England Int'l Sur. of Am., Inc.*, 961 F.2d 529 (5th Cir. 1992); *Martin Ins. Agency, Inc. v. Prudential Reins. Co.*, 910 F.2d 249 (5th Cir. 1990); *Gonzalez v. Media Elements, Inc.*, 946 F.2d 157 (1st Cir. 1991); *Law Enforcement Ins. Co. v. Corcoran*, 807 F.2d 38 (2d Cir. 1986); *Lac D' Amiante du Quebec, Ltee v. American Home Assurance Co.*, 864 F.2d 1033 (3d Cir. 1988); *Wolfson v. Mutual Benefit Life Ins. Co.*, 51 F.3d 141 (8th Cir. 1995); *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699 (10th Cir. 1988). Further, some of these cases upheld the *Burford* abstention in such actions without regard for the

type of relief sought. *See, e.g., Wolfson*, 51 F.3d at 147; *Lac D' Amiante*, 864 F.2d at 1044.

Quackenbush, however, changed, or at least clarified, the law. In that opinion, this Court cautioned the lower courts against too easily relinquishing congressionally mandated diversity jurisdiction. *Quackenbush*, 517 U.S. at 715 ("federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress"). As noted, *Quackenbush* limited a federal court's ability to invoke an abstention doctrine to those cases where the relief sought relied on a court's discretion. *Id.* at 731. This limit was based on the history of the abstention doctrines and serves as a protector of the congressionally granted federal court jurisdiction.

Since *Quackenbush*, the federal courts have followed this clear mandate and will only abstain where the relief sought relies on the court's discretion. *See, e.g., Munich American Insurance Company v. Crawford*, 141 F.3d 585, 589 (5th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 539 (1999) (acknowledging that a court may abstain "only where the district court has discretion to grant or deny relief"); *Front Royal and Warren County Ind. Park Corp. v. Town of Front Royal, Virginia*, 135 F.3d 275, 282 (4th Cir. 1998) (acknowledging and accepting *Quackenbush's* limitation on abstention and stating that "[i]n damages actions, a federal court cannot dismiss the action but can enter a stay to await the conclusion of the state proceeding."); *DeMauro v. DeMauro*, 115 F.3d 94, 98 (1st Cir. 1997) (finding that a district court may not invoke an abstention to dismiss a damages only action).

Webb cites the First Circuit's opinion in *DeMauro* as a basis upon which this Court should accept jurisdiction. The *DeMauro* court stated in dicta that it read the *Quackenbush* opinion to mean "that abstention, under *Burford* or otherwise may be appropriate in suits for damages." *See DeMauro*, 115 F.3d at 98. According to *Webb*, this conflicts with the Fifth Circuit's opinion in *Webb*.

Webb's analysis is wrong. If Webb had read the next paragraph in the *DeMauro* opinion, he would have seen that the First Circuit acknowledged and embraced the fact that a remand or dismissal under *Burford* is not available in a damages only action:

> [B]ut the court means what it says: *Quackenbush* held that the dismissal of a damages action on *Burford* grounds was reversible error, without deciding "a more limited abstention based stay order would have been warranted on the facts of this case."

DeMauro, 115 F.3d at 98, citing *Quackenbush*, 517 U.S. at 731.

Webb's suggestion that the *Webb* opinion conflicts with the Fifth Circuit's prior decision in *Clark v. Fitzgibbons*, 105 F.3d 1049 (5th Cir. 1997) is legally and logically flawed. Webb advanced this argument in the court below and it was rejected. *Webb*, 174 F.3d at 702. *Clark* involved the Fifth Circuit's review of an abstention-based remand order in a suit brought by an Arizona insurance receiver attempting to recover money for an insolvent insurance company. Among the relief sought by the insurance receiver in *Clark* was an injunction to prohibit the misappropriation of funds. As the plaintiff asked for injunctive relief – a remedy that relies on the court's discretion –

Quackenbush did not apply. Unlike the receiver in *Clark*, the receiver in *Webb* does not seek discretionary relief. Accordingly, the *Clark* opinion and the *Webb* opinion do not conflict. Further, both are consistent with *Quackenbush*.

V. *Quantum meruit* is a claim for money damages and is not a claim that can be remanded based on the *Burford* abstention doctrine.

Webb seeks $674,335.00 in money damages from B.C. Rogers. Webb argues that his claim for *quantum meruit* – a remedy based on an equitable doctrine – means that the district court's remand order fits within the confines of *Quackenbush's* "equitable or otherwise discretionary" exception. The Fifth Circuit addressed this argument in the *Webb* opinion and noted that a claim for *quantum meruit* seeks money damages and that "when a court hears a claim for *quantum meruit*, it neither sits in equity nor possesses discretion." *Webb*, 174 F.3d at 704. Thus, since *quantum meruit* is a claim for money damages only, and is not based on the court's discretion to grant or deny relief, it does not fit within *Quackenbush's* narrow exception. *Id.* at 705.

The Fifth Circuit's conclusions regarding *quantum meruit* are well reasoned and well researched. In his opinion, Justice Smith acknowledged that "courts frequently refer to *quantum meruit* as an equitable doctrine and even as seeking equitable relief." *Webb*, 174 F.3d at 704. He then goes on to cite numerous cases, including cases from Texas, where *quantum meruit* is discussed as being an action based on equitable principles. *See Webb*, 174 F.3d at

704-05, n. 17, 18 and 19. Regardless, as Justice Smith notes, the relief sought is money damages and the claim cannot be remanded on abstention grounds. *Id.* at 705.

Despite Justice Smith's fair treatment of the subject, Webb argues that the Fifth Circuit's opinion conflicts with an opinion from the Second Circuit and two opinions from the Texas Supreme Court. Webb's argument is disingenuous. Webb provides no legal or factual analysis for the opinions he cites. The Second Circuit opinion cited by Webb, *McNamee, Lochner, Titus & Williams, P.C. v. Higher Education Assistance Foundation*, 50 F.3d 120 (2nd Cir. 1994), merely referred to *quantum meruit* as an "equitable remedy". Further, the *McNamee* court made this statement in a footnote and as dicta. *McNamee*, 50 F.2d at 125 n. 1. Regardless, this dicta does not conflict with anything the Fifth Circuit stated in *Webb*. The *Webb* opinion acknowledges that *quantum meruit* is based on an equitable doctrine. The issue, however, is that the relief sought is money damages. In this regard, the *Webb* opinion is completely consistent with the *McNamee* opinion, as money damages were also sought in that case. *See McNamee*, 50 F.3d at 123 (plaintiff seeking to recover money damages for serviced rendered).

Webb's argument that the Fifth Circuit's opinion conflicts with the Texas Supreme Court rulings on *quantum meruit* is also wrong. Again, Webb provides no legal or factual analysis of *Vortt Exploration Co. v. Chevron USA*, 787 S.W.2d 942, 944 (Tex. 1990) or *Truly v. Austin*, 744 S.W.2d 934, 938 (Tex. 1988). In both cases, the Texas Supreme Court discussed the fact that *quantum meruit* is based on an equitable doctrine. *See Vortt*, 787 S.W.2d at 944; *Truly*, 744 S.W.2d at 938. That historical foundation is

of no import. The relief sought in *Vortt* and *Truly* was money damages. *See Vortt*, 787 S.W.2d at 944 (suit for the recovery of money for providing seismic information to oil company); *Truly*, 744 S.W.2d at 936 (suit for the recovery of money based on services performed on behalf of a joint venture). As such, the Fifth Circuit's opinion in *Webb* and the Texas Supreme Court's opinions in *Vortt* and *Truly* are consistent. All three opinions acknowledged the equitable foundations of *quantum meruit*, but all three are money damages cases.

VI. *Quantum meruit* is a claim for legal relief and cannot be remanded based on the *Burford* abstention doctrine.

In *Quackenbush*, this court clearly dictated that abstention-based remand was not available in a damages only action. Only where the relief sought is discretionary, may a court invoke an abstention doctrine to remand or dismiss a cause of action. Based on this clear mandate, it is equally clear that Webb's claim for money damage based on *quantum meruit* is not subject to remand on abstention grounds.

It is not disputed that Webb's claim for *quantum meruit* seeks only money damages. The fact that court's have stated that *quantum meruit* has some relationship to claims sounding in equity does not render the nature of relief sought "equitable" for purposes of this analysis. The beginning and end of the inquiry is whether the *relief* sought is legal – money damages – or equitable – dependent on the court's discretion.

This Court and other federal courts often deal with the issue of characterizing a claim as legal or equitable when deciding whether a litigant is entitled to a jury trial on a certain claim. The Seventh Amendment provides:

> In suits of common law, where the value in controversy shall exceed $20.00 the right of trial by jury shall be preserved . . .

U.S. Const. amend. VII. This court has long held that actions for damages are actions at law triable to a jury. *See Whitehead v. Shattec*, 138 U.S. 146, 151 (1891); *Pernell v. South Hall Realty*, 416 U.S. 363, 370 (1974). In *Whitehead*, this court recognized that:

> [I]t would be difficult, and perhaps impossible, to state any general rule which would determine in all cases what should be deemed a suit in equity as distinguished from an action at law . . . ; but this may be said, that where an action is simply for the recovery . . . of a money judgment, the action is one at law.

Whitehead, 138 U.S. at 151. *Quantum meruit* is simply a claim for the recovery of a money judgment. It is an action at law and not a suit in equity. Accordingly, Webb's claim for *quantum meruit* falls squarely within the broad net cast by *Quackenbush* and supports the Fifth Circuit's finding in *Webb* that the *quantum meruit* claim was not subject to remand on abstention grounds.

VII. Historically, *quantum meruit* is a claim that evolved in the common law courts.

Even though modern day courts sometimes state that *quantum meruit* is based on an equitable doctrine, the

claim has its origins in the common law courts. *Quantum meruit* was an action at common law which derived from the claim of assumpsit. RESTATEMENT, RESTITUTION, Part I, Introductory Note pp. 5-8 (discussing the development of *quantum meruit* in the common law courts based on suits in assumpsit); Dictionary of Modern Legal Usage 457 (1987) ("*Quantum meruit* [was] used at common law by pleaders in suits in assumpsit, and [is] still used today."); Black's Law Dictionary 112 (5th ed. 1979) (Assumpsit is "a common law form of action . . . [which] may be maintained whenever anything is received or done from the circumstances of which the law implies a promise of compensation."); Benjamin J. Shipman, Handbook of Common-Law Pleading 167 (3d ed. 1923) (categorizing *quantum meruit* as a form of general assumpsit brought to recover compensation for work done or services rendered); J.B. Ames, The History of Assumpsit: Implied Assumpsit, 2 Harv. L. Rev. 53, 58, 59-60 (1888) (noting that *quantum meruit* recovery in assumpsit first appeared in 1609 and attributing this "late" development to the existence of alternative remedies in equity); *see also Henderson Bridge Co. v. McGrath*, 134 U.S. 260, 275-76, (1890) (affirming jury verdict and instructions given for *quantum meruit* action brought at law). Thus, based on the true historical background of *quantum meruit*, it is undeniable that a claim for *quantum meruit* could not be remanded on abstention grounds. Only when the court "is asked to employ its historic powers as a court of equity" can it invoke an abstention doctrine. *Quackenbush*, 517 U.S. at 717 (citations omitted). *Quantum meruit* was not a creature of the equity courts.

VIII. *Webb* presents no significant issues for this Court's review.

Webb claims that the McCarran-Ferguson Act is somehow offended by the *Webb* opinion. This argument is wrong. "The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, did not remove federal diversity jurisdiction from the federal courts in insurance matters." *Martin Ins. Agency, Inc. v. Prudential Reins. Ins. Co.*, 910 F.2d 249, 254 (5th Cir. 1990). Thus, what Congress granted the federal courts in diversity jurisdiction, it did not take away in the McCarran-Ferguson Act. Nothing in the McCarran-Ferguson Act precludes a federal court from hearing a simple damages action. Webb's McCarran-Ferguson Act argument is irrelevant.

Webb also makes the "sky is falling" argument that allowing a federal court to try a simple damages action brought by a state appointed receiver will disrupt the entire insurance insolvency scheme set up by the State of Texas. This argument is nothing more than a rote recitation of the *Burford* doctrine without any analysis. Regardless, this court in *Quackenbush* addressed the situation of a federal court case that might disrupt the state's ongoing proceeding; under those circumstances, the federal court may stay the proceedings, but not remand or dismiss. *Quackenbush*, 517 U.S. at 731. Under any circumstances, the district court in this case abused its discretion by remanding this damages only action. The Fifth Circuit correctly decided *Webb*.

IX. Conclusion

On all grounds, *Webb* fails to present a case worthy of Supreme Court review. The Fifth Circuit's opinion in *Webb v. B.C. Rogers* is completely consistent with this Court's opinion in *Quackenbush v. Allstate Insurance Company*. Simply stated, *Webb* echoes the *Quackenbush* holding that abstention based remand is not available in a damages only action. Further, the Fifth Circuit's *Webb* opinion is completely consistent with the rulings of the Texas Supreme Court and those to the other circuits.

For these reasons, Webb's Petition for Writ of Certiorari should be DENIED.

Respectfully submitted,

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